IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 323

ELMER F. CRAVALHO, et al., *Appellants,*

v.

WILLIAM S. RICHARDSON, et al., *Appellees.*

No. 409

KAZUHISA ABE, et al., *Appellants,*

v.

WILLIAM S. RICHARDSON, et al., *Appellees.*

On Appeals from the United States District Court for the District of Hawaii

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MEMORANDUM FOR APPELLEE JOHN A. BURNS, GOVERNOR OF THE STATE OF HAWAII

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1. These are appeals taken by certain Hawaii State Representatives (the *Cravalho* appeal, No. 323), and by certain Hawaii State Senators (the *Abe* appeal, No. 409), intervening defendants below, in the same case in the District Court for the District of Hawaii that is the subject of the appeal by Governor Burns, in *Burns* v. *Richardson, et al.,* No. 318, O. T. 1965, cur-

rently pending before this Court on appellant Burns' Jurisdictional Statement.

The primary questions raised by the present appellants relate to the rejection by the District Court of the provisional Hawaii Senate reapportionment plan submitted to the District Court in April 1965.[1] This provisional plan, which superimposed a system of multimember Senate districting upon the existing multimember district scheme of representation in the House, was submitted to the District Court on April 14, 1965. On three hearing days thereafter, testimony, including expert testimony, and argument on the provisional plan were submitted to the District Court. On April 28, 1965, the District Court issued an opinion and order extensively discussing the plan and holding it inconsistent with the Equal Protection Clause.

2. We submit that the District Court correctly held that the Senate provisional plan of April 14 was not consistent with the Equal Protection Clause. Whether "designedly or otherwise,"[2] the plan denied fair, effective and equal representation for all citizens.

The provisional plan imposed a system dividing the state into eight senatorial districts. Twenty-five senators were apportioned among these eight districts. Only one of the eight proposed districts was to be a single-member district, and one other a two-member district; the remaining six districts were to have three or four senators each. This plan was properly considered by the District Court against the backdrop of

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[1] For the background of the provisional Senate plan, see our Jurisdictional Statement in No. 318, pp. 9-11.

[2] See *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965).

the fact that the Hawaii House of Representatives also was organized on a multimember basis.[3]

The District Court was clearly correct in holding that the provisional Senate plan undervalued the votes of certain minorities, "entrapped" within large multimember districts, and consequently violated the Equal Protection Clause as interpreted in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 653 (1964). For example, the proposed Seventh Senatorial District, forming a portion of Honolulu County, consisted of the existing Sixteenth and Seventeenth Representative Districts. These two districts embrace two clearly defined groups, each ethnically, geographically and economically divided from the other. In one are found the lower income laborers, operatives and clerical workers, with a 1959 median family income of approximately $3,000, and in the other the upper professional and managerial classes, with a 1959 median family income of close to $16,000. But one of these Representative Districts is substantially more populous than the other, and it is

[3] As we contend in the appeal in No. 318, the District Court made the clear error of affirmatively upholding the present apportionment of the Hawaii House of Representatives, although as a matter of fact the apportionment of the two houses was not severable, and as a matter of law under this Court's decision in *Maryland Committee* v. *Tawes*, 377 U.S. 656, 673 (1964), it was erroneous for it to pass upon the validity of the apportionment of one house of a bicameral legislature without having the apportionment of the other before it. However, given its premise that the apportionment of the House was proper, the District Court's action in considering the provisional Senate reapportionment proposal in connection with the existing apportionment of the House was certainly appropriate. Indeed, as we point out in our Jurisdictional Statement in No. 318, this approach by the District Court underscores the inseverability of the question of the apportionment of the House and of the Senate.

not improbable to conclude that all four senators from the proposed Senatorial District would have been elected from that Representative District. Single-member districting would have given the diverse interests more effective representation and would not have submerged any of them. — Similar situations exist in varying degrees as to the other proposed Senatorial Districts.

Moreover, as the District Court correctly recognized, in a bicameral legislature one house should act as a counterbalance to the other or serve to offset inequities in the other. Instead of achieving this end, the provisional Senate reapportionment plan serves, as the District Court concluded, only to compound the problems caused by the multimember districting system in the House. — Thus, the massive existing Fifteenth Representative District has virtually the same boundaries as the proposed Sixth Senatorial District in the plan rejected by the District Court. The Fifteenth Representative District has six members (12% of the House membership) and under the proposed plan would have had four senators (or 16% of the Senate). In similar fashion, the existing Eighth Representative District, with four House members, under the provisional Senate plan was to constitute the Third Senatorial District, with three senators. The District Court rightly concluded that: "[T]he realistic political weight of the voters in both the third and sixth senatorial districts would far exceed the political weight of any voter in any other district, not only in Honolulu but in any other county of the State." (J.S. No. 323, p. 13a) And the District Court rightly concluded that the plan—although its method of overvaluation was,

perhaps, "complicated or sophisticated" [4]—was invalid under this Court's decisions on this basis as well.

3. Appellants in these appeals also raise a question as to the correctness of the District Court's ruling that reapportionment must be effected by constitutional amendment, thereby foreclosing provisional reapportionment by statute. (Question 8, J.S. No. 323, p. 7; Question 11, J.S. No. 409, p. 6)[5] They also challenge as excessive, and consequently an abuse of discretion, the District Court's prohibition against other legislation until reapportionment had been provided for. (Question 7, J.S. No. 323, p. 7; Question 1, J.S. No. 409, p. 4) As to these points, it appears that the position of appellants in the present appeals may be in substantial part the same as the position taken by Governor Burns in his appeal in No. 318. (See J.S., No. 318, Questions 8 and 9, p. 5; p. 5 n. 2; pp. 28-34)

4. Had the only questions now presented to this Court on appeal from the District Court's orders in the case below been the questions the present appellants seek to raise as to the correctness of the District Court's rejection of the provisional Senate reapportionment plan, it might well be considered that the District Court's decision—based as it was on a full hearing and on the receipt of evidence—was so clearly factually supported by substantial evidence and correct as a matter of law as not to warrant plenary review on appeal by this Court.

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[4] *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 653 (1964).

[5] Appellants in No. 409 also challenge, as does Governor Burns in No. 318, the requirement that there be a permanent, as opposed to an interim, plan in effect by the 1966 general elections. (J.S. No. 409, p. 30)

However, those are not the only matters concerning Hawaii's reapportionment that is currently before the Court. In the Governor's appeal in No. 318, we are urging the Court to consider various aspects of the Hawaii reapportionment situation, including, among other points, the use of "registered voters" rather than "total population" as the basis for reapportionment; the question of multimember districting; and the inseverability of the question of representation in the Hawaii House of Representatives from that in the Hawaii Senate. These issues find their counterparts in the provisional Senate reapportionment plan, struck down by the District Court, which is the subject of the present appeals. For example, the provisional Senate reapportionment plan, among its other vices, uses the basis of "registered voters" rather than "total population";[6] it compounds the inequities, against which our appeal in No. 318 complains, of the multimember districting in use in the House; and it furnishes an object lesson of the inseverability of the questions of representation in the two houses.

Accordingly, Governor Burns does not object, if probable jurisdiction is noted in No. 318, to the notation of probable jurisdiction as to these appeals, so that the Court may consider together the various questions raised as to the orders below.

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[6] We of course reserve the right to defend the District Court's rejection of the provisional plan on this ground—which was not, of course, relied on by the District Court—or on other alternative grounds.

CONCLUSION

If probable jurisdiction is noted in No. 318, we would not object to the notation of probable jurisdiction in the appeals in Nos. 323 and 409, or to the consolidation of the cases for oral argument.

Respectfully submitted,

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